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Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 221.

AMERICAN SMELTING & REFINING COMPANY, *Appellant*,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

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CHARLES EARL,
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Attorneys for Appellant.

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Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

The Court of Claims dismissed, rec. p. 58, claimant's amended petition, p. 15, upon demurrer, p. 58, with an opinion, p. 10. The claim arises out of the delivery of copper during the war. The question is solely as to the price due therefor. The issues are whether the delivery was under a commandeering order or an express or an implied contract and, in either view, whether the full price legally due has been paid.

I. STATEMENT OF CASE.

The details of the transaction are fully stated in the amended petition, p. 15. The material facts are summarized as follows:

1. Copper being a great fundamental war necessity, limited in possible amount of production, the government early assumed complete control of production and dis-

tribution by price fixing and by securing the organization of a Copper Producers' Committee. This committee, under supervision of the War Industries Board, distributed orders and allocated deliveries and provided that all orders for the use of allied European governments were to be filled by the appellant and all orders for use of the United States by the United Metals Selling Company. Producers were notified that their mines and plants would be taken over, if they failed to conform to arrangement and price. The price was fixed by the President on September 21, 1917, at 23.5 cents a pound. It continued at this figure to June 1, 1918, by another order issued about January 1, 1918. It was raised to 26 cents on July 2, 1918, and so continued. Except for the price fixing, the price of copper would greatly have exceeded these figures.

See amended petition, par. III, rec. pp. 15-16; par. IV, p. 17; Official Report of War Industries Board to the President, Chapter III, p. 130, reprinted as Appendix No. 1, *post*, p. 37, showing history of copper in the war; Extracts from Official Bulletin, Appendix No. 2, *post*, p. 48, showing authority for price fixing. See also War Industries Board Price Bulletin No. 3, "Government Control over Prices," pp. 195-215, 272-284.

2. The price of 26 cents per pound so fixed was fair and just compensation for copper from July 2, 1918, the date when the claim begins, amended petition, par. XIII, p. 25.

3. On March 28, 1918, the following letter, rec. p. 31, was written by the Ordnance Bureau, Procurement Division, to appellant:

"1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 Metric Tons (66,138,000

pounds) of Copper at a price of 23½ cents per pound net, f.o.b. New York basis.

"2. Deliveries are to be completed on or before June 1, 1918.

"3. Shipping Instructions with reference to all shipments should be taken up with the Supply Division, Ordnance Department, Major Jewett.

"4. It is requested that your Company keep in touch with the French High Commission, as to shapes, sizes and specifications, which they will require on this contract.

"5. Inspection on the part of the French Government will be made at the refineries.

"6. Payment papers are to be made out in accordance with attached instructions pertaining to shipment of raw materials and payment papers.

"7. The above-mentioned Copper is to be prime lake or electrolytic 99.9 per cent pure not less than 99.88 per cent pure according to standard of American Society for testing materials.

"8. Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days."

Appellant replied on April 11, as follows, rec. p. 34:

"We have your favor March 28th under the above reference number, and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future."

4. Previous to this, an order for the same quantity of copper at the same price had been given on March 14, 1918, to the United Metals Selling Company, associated with appellant under the Copper Producers' Committee, as stated in par. 1, *ante*, p. 6, to be delivered at 5,000 tons a month from March to August. That company objected to this price for deliveries after June 1. The Ordnance Bureau then ordered the entire delivery to

be made by June 1, 1918. Upon ascertaining that this order was for export, the United Metals Selling Company asked to have it transferred from that company to appellant. This was done under the cooperative system of distribution of orders fixed by the Copper Producers' Committee, under the supervision of the War Industries Board, as stated in par. 1, *ante*, p. 6, whereby these two companies took care of domestic and foreign orders respectively. See amended petition, pars. V, VI, rec. pp. 17-19; Exhibits A to E, rec. pp. 26-31.

5. Deliveries were made as follows:

By April 10, amd. petition, par. VI, rec. p. 19, 2,500 tons.

By June 1, par. VII, p. 20, 10,575 tons.

By July 2, par. VII, p. 21, 20,701 tons.

On July 2, balance undelivered, 9,299 tons or 20,500,620 pounds.

This was the date when the higher price was fixed.

The balance was delivered as promptly as possible between July 2 and November 15, 1918, par. IX, p. 23.

6. The whole amount was not delivered before July 2 because:

(a) Specifications and shipping instructions required by the letter of March 28, 1918, Exhibit F, pars. 3, 4, rec. p. 32, had not been received, amended petition, par. VI, p. 19; par VII, pp. 20, 21; par. IX, p. 23; par. X, p. 24, and

(b) Because other departments of the government had demanded the copper for delivery to mills in this country, amended petition, par. VII, p. 20; Exhibit J, par. 7, p. 35.

7. On April 18, 1918, amended petition, par. VII, rec. p. 20, the Ordnance Bureau transmitted to appellant a blank contract for the delivery of the entire 30,000 tons to be completed on or before June 1, 1918. Ap-

pellant refused to sign it because the deliveries could not be made for the reasons above stated, see par. VII, pp. 20-21. Appellant was asked on May 31, June 10 and June 11 to sign and on June 27, Exhibit J, p. 34, made a full statement of its objections and insisted that all copper delivered after June 1 should be at the price to be officially fixed for deliveries after that date.

8. Thereafter the Ordnance Bureau continued to insist upon the price of 23.5 cents per pound for deliveries after June 1 and the appellant upon the price fixed by the War Industries Board, 26 cents per pound, after July 2, 1918, amended petition, par. VIII, rec. pp. 21-22; Exhibits K to U, pp. 36-46.

9. Payments had been continuously made. But beginning October 7, 1918, par. X, p. 23; Exhibit P, p. 41, and continuing until January 13, 1919, par. XI, p. 24; Exhibits Q to Z, pp. 42-57, the government insisted that a formal contract must be signed in order that further payments should be made even at the price claimed by the government.

10. The amount then due appellant at the price admitted by the government was \$2,714,477.13, Exhibit W, p. 54, being for 11,550,966 pounds at 23.5 cents per pound.

11. On January 13, 1919, appellant signed a formal contract, Exhibit V, p. 46. This bore the heading: "Dated March 28, 1918. Expires June 1, 1918." It was drawn up exactly in form as if it were signed on the date which it bears and is throughout wholly inconsistent with conditions existent upon the date of its signature. Its most pertinent passages are, rec. p. 47:

"Now, therefore, under the provisions of Section 120 of an act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of

the United States and Executive Orders of the President of the United States or heads of its departments under which the requirements of advertisement for proposals are dispensed with and contracts in the form hereof duly authorized, and in consideration of the mutual agreements herein contained, the said parties have agreed and by these presents do agree to and with each other as follows, viz:

* * * * *

"Article II. The contractor agrees to deliver to the United States the copper herein contracted for on cars or on lighters at or near plants represented by the contractor, deliveries to begin on or before March 1, 1918, in accordance with shipping instructions of the Chief of Ordnance, at the rate of 10,000 metric tons per month, and to be completed on or before June 1, 1918."

P. 48:

"Article III. The sum of \$0.235 f. o. b. cars New York basis hereby fixed as the contract price of each pound in weight of the copper delivered and accepted, will be paid by the United States to the contractor as follows:

Appellant accompanied this by its letter dated January 13, 1919, Exhibit W, p. 54, which substantially recited the foregoing facts, including the claim for 26 cents per pound for delivery after July 2, 1918, and concluded:

"The Company executes and delivers the formal contract in question under protest, and subject to the proviso that it shall not be estopped or precluded thereby from asserting its aforesaid claim to the same extent and with like effect as if such formal contract had not been executed and delivered, and that, such formal contract to the contrary notwithstanding, the price lawfully payable in respect to all copper delivered pursuant to the order in question after July 2, 1918, shall remain subject to future agreement between the parties, or to determination

by competent authority. The intention of this proviso is that the rights and interests neither of the United States on the one hand, nor of the Company on the other, in respect to the price matter referred to, as they now exist, shall be in any wise prejudiced or jeopardized by the delivery and acceptance of the formal contract in question with this letter attached, or by the payment and acceptance of the balance due on the price basis of $23\frac{1}{2}$ cents."

12. Appellant was thereafter paid $23\frac{1}{2}$ cents per pound for the copper delivered and not paid for, amended petition, par. XII, rec. p. 24.

13. The protests were continuous against delivering any copper after June 1, 1918, for less than the price fixed by the War Industries Board. See protest of United Metals Selling Company, March 19, 1918, Exhibit B, rec. pp. 27-28; repeated refusals to execute formal contract, amended petition, par. VII, pp. 20-21; letter of June 27, 1918, Exhibit J, p. 34; continuous protests on payments for deliveries after July 2, 1918, Exhibit T, par. (5), p. 44; efforts to arbitrate price, amended petition, par. VIII, pp. 21-22; August 15, 1918, Exhibit L, p. 37; August 16, 1918, Exhibit N, p. 39; September 11, 1918, Exhibit O, p. 40; October 16, 1918, Exhibit T, p. 44; January 13, 1919, Exhibit W, p. 54; January 17, 1919, Exhibit Y, p. 56.

14. Claim was presented to the Secretary of War for $2\frac{1}{2}$ cents per pound on the amount delivered after July 2, 1918, and this claim was disallowed, amended petition, par. XIV, p. 25.

15. The Court of Claims sustained the demurrer and dismissed the petition for the following reason, rec. p. 13:

"The letter written by the Ordnance Department to the plaintiff was a proposal that the plaintiff should furnish and deliver a certain amount of copper at a certain

price within a certain time; the acceptance of that proposal in writing by the plaintiff completed the transaction, and the proposal and acceptance together constituted a contract between the parties, and from the instant of the acceptance of the proposal there was a full and distinct accord between them. The plaintiff's protests and reservations made when it signed the formal contract, long after the contract was completed, are of no effect."

Statutes.

The statutes which need to be considered here are quoted in Appendix No. 3, *post*, p. 56. They are the following:

Rev. Stat., Sec. 3744, making it the duty of the Secretary of War to require every contract made by him "to be reduced to writing, and signed by the contracting parties with their names at the end thereof." See *post*, p. 56.

Rev. Stat., Sec. 3709, requiring all purchases and contracts for supplies in any department to be made by advertising for proposals except when the public exigency requires "immediate delivery," when the articles may be procured by open purchase or contract "in the manner in which such articles are usually bought and sold" between individuals. See *post*, p. 56.

National Defense Act of June 3, 1916, Sec. 120, 39 Stat. 213, authorizing the President in time of war "in addition to the present authorized methods of purchase or procurement, to place an order" for material required, making it obligatory under a penalty to furnish the materials ordered and giving precedence to such orders and declaring that the compensation for materials so ordered "shall be fair and just." See *post*, p. 57.

Act of May 20, 1918 (Overman Act), 40 Stat. 556,

authorizing the President to redistribute functions among executive agencies in his discretion. See *post*, p. 58.

Act of March 2, 1919 (Dent Act), 40 Stat. 1272, authorizing the Secretary of War "to adjust, pay or discharge any agreement, express or implied, upon a fair and equitable basis" entered into during the war "for the production, manufacture, sale, acquisition or control of equipment, materials or supplies," when such agreement has not been executed in the manner prescribed by law, and giving jurisdiction to the Court of Claims "to find and award fair and just compensation" in such cases where the adjustment offered by the Secretary of War is unsatisfactory. See *post*, p. 60.

The practical construction of Revised Statutes, Sec. 3744, in *Clark v. United States*, 95 U. S. 539, 542, should be considered, declaring that "where a parol contract has been wholly or partially executed and performed on one side," the party performing will be entitled to recover the fair value of his property or services "as upon an implied contract for a *quantum meruit*."

II. Assignment of Error.

Appellant says that the Court of Claims made the following errors:

1. In holding that the copper in question was not delivered under an order issued by authority of Sec. 120 of the act of June 3, 1916, but under a contract.

2. If the copper was delivered under a contract, in holding that claimant was not entitled to recover the reasonable value of the copper delivered after July 2, 1918, as fixed at 26 cents per pound by proper authority, when the failure to deliver it before that date was due to the acts or default of the United States.

3. In sustaining the demurrer and dismissing claimant's petition.

III. ARGUMENT.

The Issues.

The Court of Claims decided, see *ante*, pp. 11, 12, that the letters of the Ordnance Bureau of March 28, 1918, and of appellant of April 11, quoted, *ante*, p. 7, constituted a contract binding the parties to a price for all deliveries of 23.5 cents per pound as paid.

Appellant maintains:

(1) That the Ordnance Bureau letter of March 28 was an order under Sec. 120 of the act of June 3, 1916, *post*, p. 57; that appellant's letter of April 11 was a declaration of its readiness to fill the order without compulsion; that the compensation to be paid for copper delivered under the order was fixed by the statute at a "fair and just" price and that 26 cents was a fair and just price for all copper delivered after July 2, 1918;

(2) That, if there was a contract at a price of 23.5 cents per pound, deliveries thereunder were limited to June 1, 1918, and it was the fault of the government that the deliveries were not completed before that date;

(3) That, after June 1, 1918, war needs of the government made it appellant's patriotic duty and its consequent legal obligation to continue deliveries despite the government's default and the rise in value and made it the government's legal obligation to pay for losses caused by the default;

(4) That, if, notwithstanding war conditions, appellant was not obligated to continue deliveries after June 1, 1918, it had an election, because of the government's default, either to refuse further deliveries or to continue deliveries and claim damages for the government's default;

(5) That the government is bound by way of damages

for its delay to pay the difference between the contract price and the fair price at the date of the delayed deliveries.

An Order or a Contract.

The first question to be decided here is whether the foregoing transaction discloses a commandeering order or a contract.

A Commandeering Order.

The letter of March 28, 1918, rec. p. 31, already quoted here, *ante*, pp. 6-7, does not purport to be a contract. It is headed "War Ord. P. 4219-1788A." Its last paragraph refers to the "issuance of formal contract" in a few days. It is thus classified by the Department itself as a "War Order." Its language that "the Procurement Division is prepared to procure" the copper in question is an expression of authority no less real because politely stated.

The Circuit Court of Appeals for the Second Circuit in *Roxford Knitting Co. v. Moore*, 265 Fed. 177, supports this view, in a case going farther than this, saying, p. 188:

"It must be admitted that neither the National Defense Act nor the Navy Purchase Act prescribe any stereotyped form of order which must be used. An order might be placed under the form and terms of polite request. It is left to the discretion of the government to determine the manner in which orders are to be placed, and how its intentions are to be communicated, orally or by writing. They may be made known by telegram, or by telephone, or by letter. The acts of Congress do not prescribe the method of communication, nor the form of it."

This decision affirmed the District Court in *Moore v. Roxford Knitting Co.*, 250 Fed. 278, 283.

The original order to the United Metals Selling Company, Exhibit A, rec. p. 26, identical in language in this respect, is referred to in a letter from the Ordnance Bureau of March 23, 1918, Exhibit C, p. 28, par. 1, as "above War Order" and in par. 2, it is called "War Ord. P-4219-1788A." The Bureau, March 25, 1918, Exhibit D, par. 2, p. 29, calls it "Procurement Order P. 4219-1788A" and par. 4, p. 30, "War Ord. P. 4219-1788A."

The Ordnance Bureau, August 15, 1918, Exhibit L, par. 1, p. 37, twice called the letter of March 28 "War Ord. P. 4219-1788A" and again October 30, Exhibit V, par. 2, p. 46. The War Industries Board did the same, August 16, 1918, Exhibit M, p. 38. Appellant referred to this order as a "Procurement Order" on August 16, 1918, Exhibit N, p. 39, and on September 11, 1918, Exhibit O, par. 2, p. 40. In the form of contract drawn by the Ordnance Bureau and signed on January 13, 1919, Exhibit V, rec. p. 47, quoted, *ante*, pp. 9-10, it is recited that the contract is made "under the provisions of Section 120 of an act of Congress relating to national defense, approved June 3, 1916."

It thus appears that the parties contemporaneously treated this as a Procurement Order, a phrase doubtless derived from Sec. 120 of the act of June 3, 1916, authorizing an order "in addition to the present authorized methods of purchase or procurement."

On October 4, 1918, the Ordnance Bureau said for the first time, Exhibit R, pp. 42-43, that this was not a Procurement Order, sufficient to sustain payments for goods delivered, see Exhibit P, p. 41; Exhibit Q, p. 42; Ex-

hibit S, p. 43, although previously it had been accepted as sufficient authority for payments, Exhibit W, p. 54, including nearly half the deliveries after July 2, 1918. See *ante*, pars. 5, 9, 10, pp. 8, 9.

The acts of the parties also show that they both regarded this as a commandeering order and not a contract. Appellant continued to deliver after the contract date of delivery had passed by the government's fault (par. 6, *ante*, p. 8), and after the fixed price and the fair value had risen (pars. 1, 2, *ante*, p. 6). This was wholly unnecessary unless the deliveries were compulsory. The United States continually insisted upon the order being replaced by a contract, an act equally unnecessary, had a valid contract been already in existence.

Appellant's acceptance of the order was desired to inform the Ordnance Bureau of its intention to comply with the order and did not involve an assent to a present contractual relation. See Exhibit G, record, p. 32; Exhibit I, p. 34. It could have done no less. "Compliance" with the order was "obligatory," under penalty, act of June 3, 1916, *post*, p. 57. This did not involve acceptance of the price named, for the law prescribed "fair and just" compensation. It could imply no acceptance of the price named for deliveries after June 1, 1918, for by its terms, Exhibit F, par. 2, p. 31, all deliveries were to be completed by that date.

ONLY LAWFULLY AN ORDER.

At the date of this transaction, there were only three methods for obtaining supplies authorized by law:

(a) Under Rev. Stat., Sec. 3744, *post*, p. 56, by a written contract signed by both parties;

(b) Under Rev. Stat., Sec. 3709, *post*, p. 56, by open market purchase or contract for "immediate delivery."

(c) Under Sec. 120 of the act of June 3, 1916, *post*, p. 57, by a procurement order.

This transaction did not conform to Sec. 3744; the copper was for future delivery and therefore not under Sec. 3709. It could lawfully be only under Sec. 120 of the act of 1916. The presumption of the legality of an official action is therefore entirely favorable to the view that this was a commandeering order.

The order was given because it was simple and positive and authorized by law. The intention may have been, Exhibit F, par. 8, p. 32, when time permitted, to follow the order by a formal contract complying with Rev. Stat. Sec. 3744. The order bound the party and the material without waiting for a formal contract.

LEGAL CONSEQUENCES OF ORDER.

If this was a commandeering order, what are the legal consequences? Appellant was ordered to deliver 30,000 metric tons of copper at 23.5 cents per pound, deliveries to be completed by June 1, 1918. That was fixed as a reasonable price for deliveries up to July 2, 1918. For later deliveries the same authority fixed the reasonable price at 26 cents per pound. See par. 1, *ante*, p. 6. It was "the fair and just compensation" after that date, amended petition, par. XIII, p. 25.

The requirement of Sec. 120 of the act of June 3, 1916, in regard to compensation is that it "shall be fair and just." The government itself made it impossible to deliver this copper until after July 2, 1918, by not furnishing shipping orders and by diverting the available supply of copper to other purposes. The terms of the statute can only be complied with by paying to the

appellant the "fair and just" compensation provided by the statute for its deliveries after July 2, 1918, as claimed.

The fundamental error in the Court of Claims lies in regarding this transaction, originating in the midst of war, as arising under an ordinary voluntary contract of normal times. The whole case is properly viewed as controlled by war conditions and dominated by the compulsory powers of the government over the productive industries of the country.

COMPENSATION MUST BE JUST.

The Ordnance Bureau in endeavoring to bind appellant by its order to a fixed price acted beyond any executive or even legislative power. The want of authority is extreme. The Bureau undertook to enforce this price beyond the terminal date named in its own order. It directed a price below that fixed by the price-fixing branch of the government. This court has definitely declared the law on this point in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, saying, p. 327:

"The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

The rule has been applied to time of war in *Filbin Corporation v. United States*, 265 Fed. 354, 357; 266 Fed. 911; *National City Bank v. United States*, 217 Fed.

855; and in England in *Newcastle Breweries v. The King* (1920) 1 K. B. 854, and in *Attorney General v. de Keyser's Hotel*, 1920 App. Cases, 508, in which Lord Sumner made the following remarks, p. 563, applicable to several features of this case and particularly to the acceptance of the order by the appellant:

"Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good **which Englishmen have been too patriotic to contest**. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily subjected to which might have been disputed, and that the absence of contest and even of protest is by no means always an admission of the right."

SUMMARY.

It is respectfully submitted that the foregoing shows that this copper was furnished under a procurement order under the act of June 3, 1916, and that payment must be made at the "fair and just" price of 26 cents per pound.

Was there a Contract?

If this delivery was not under a commandeering order, as above maintained, it was under some sort of an agreement, express or implied, formal or informal, valid or not binding. Three possible kinds require consideration here:

(a) An express contract in the form of law as required by Rev. Stat., Sec. 3744, p. 56;

(b) An implied contract to pay for goods delivered, where no formal contract existed, recognized in *Clark v. United States*, 95 U. S. 539, *ante*, p. 13;

(c) An informal agreement "not executed in the manner prescribed by law," recognized by the Dent Act of March 2, 1919, *post*, p. 60, as requiring adjustment "upon a fair and equitable basis."

Appellant maintains that it is entitled to recover under either of these forms, but that, if there is any contract as distinct from an order, it is properly either an implied contract upon an executed delivery or an informal agreement recognized by the Dent Act.

No Formal Contract.

The only contract in the record complying in form with Rev. Stat., Sec. 3744, is that bearing date March 28, 1918, signed January 13, 1919, Exhibit V, rec. p. 46; amended petition, par. XI, p. 24. It will be recalled, as stated, par. 7, *ante*, p. 8, that from April 18, 1918, the Ordnance Bureau had endeavored to secure appellant's signature to a formal contract. This was continuously refused because appellant would not even seem to concede a price of 23.5 cents after July 2, 1918, until appellant was told that nearly \$3,000,000 admittedly due would not be paid without such signature. This, when signed, was accompanied by a protest, Exhibit W, rec. p. 54, reserving all right to 26 cents per pound for deliveries after July 2, 1918, with like effect as if such formal contract had not been executed, *ante*, pars. 8-10, p. 9.

The Court of Claims ignored this formal contract, holding, rec. p. 13, that the Bureau order of March 28, 1918, and claimant's letter of April 11, 1918, Exhibits F and I, pp. 31, 34, made a contract. It was rightfully ignored. It was a mock contract. The deliveries had all been made and five-sixths paid for. Yet this provides for future delivery and payment, specifies the manner and form of delivery, fixes completion of deliveries

at June 1, rec. p. 47, although nearly a third had been made after July 2, provides precedence over private deliveries, p. 48, defines inspection, authorizes cancellation for default and termination for good cause before completion, p. 49, forbids assignment, regulates subcontracts and makes other conditions for its performance, p. 51. Viewed as a contract, all this is mere futility because the goods were delivered and the parties did not mean to obligate themselves to future action. The circumstances show that it was not intended as a contract at all. It was executed because one party refused to pay its admitted obligations unless such a paper were signed.

Such action was positively condemned by the Comptroller of the Treasury in a decision relating to war contracts, November 25, 1918, 25 Comp. Dec. 398, 404:

"Of course it is understood a legal contract can not be made now for articles the Government does not need, and this is true regardless of prior negotiations or understandings, written or oral."

This paper is not within any recognized definition of contract. Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheaton, 122, said, p. 197:

"A contract is an agreement in which a party undertakes to do or not to do a particular thing."

The latest philosophical writer, 1 Williston on Contracts, says, p. 1:

"A contract is a promise, or set of promises, to which the law attaches legal obligation."

Either definition involves present or future action. A paper relating solely to past performance is not a contract.

VALUE OF THIS PAPER.

This formal contract may have some evidential value as a declaration of what the parties concede to have been their obligations. This is subject to the following qualifications:

(1) The protest accompanying the contract, Exhibit W, rec. p. 54, expressly declares that appellant denies any agreement to accept as in full 23.5 cents per pound for deliveries after July 2, 1918, and asserts a right to 26 cents per pound for deliveries after July 2, 1918. There is thus no admission of the fact here in issue.

(2) Signature to this paper was forced by a threat to hold up \$2,700,000 admittedly due. Of what value is evidence so obtained?

PRINCIPLES OF THE FOREGOING.

All the foregoing is in accordance with fully settled principles of law.

1. It may always be shown that an instrument bearing one date was actually signed and delivered on another day. In *District of Columbia v. Camden Iron Works*, 181 U. S. 453, this court after citing authorities, says, p. 461:

"These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed, from which time it takes effect."

2. It may always be shown that a paper in form a contract was not intended by the parties as a contract. In *Ware v. Allen*, 128 U. S. 590, this court quoted with approval the opinion in *Pym v. Campbell*, 6 Ell. & Bl. 370, 373, as follows, p. 596:

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

See also *Burke v. Dulaney*, 153 U. S. 228, 238; *Brady v. Kern*, 218 Fed. 862; 222 Fed. 873.

3. All written instruments forming parts of a single transaction must be read together. It is said in *Bailey v. Railroad Company*, 17 Wall. 96, p. 108:

"It is well-settled law that several writings executed between the same parties substantially at the same time and relating to the same subject-matter may be read together as forming parts of one transaction."

This rule was applied to a contract and contemporaneous letters in *Gould v. Magnolia Metal Co.*, 108 Ill. App. 203; *Cape Ann Granite Co. v. United States*, 20 C. Cls. 1, 15; *Sanborn v. United States*, 46 C. Cls. 254, 260; *Pneumatic Gun-Carriage Co. v. United States*, 36 C. Cls. 71, 84, 93; *Noel Construction Co. v. United States*, 50 C. Cls. 98, 104. The two latter cases follow this court in *Wm. Cramp & Sons Co. v. United States*, 216 U. S. 494, 499.

VALIDITY OF CONTRACT SUPPOSED.

If, contrary to the view previously asserted, the transaction of January 13, 1919, Exhibits V and W, rec. pp. 46-55, is contractual, what is the contract?

(a) The United States submitted a contract providing for deliveries to June 1, 1918, at 23.5 per pound.

(b) Appellant agreed with a proviso, rec. p. 55, that "the price lawfully payable in respect to all copper delivered pursuant to the order in question after July 2, 1918, shall remain subject to future agreement between the parties, or to determination by competent authority."

(c) The United States accepted this reservation by receiving and filing the same with the formal contract, by making payments thereunder, and by stating its understanding "that you signed the contract 'under protest.'"

If these actions made any contract, it was a contract for 23.5 cents per pound to June 1, 1918, and for a reasonable price thereafter. What is a reasonable price is determined for purposes of this demurrer by the allegation of the amended petition, par. XIII, record, p. 25, that the price of 26 cents per pound fixed by the War Industries Board after July 2, 1918, was "the fair and just compensation for copper."

An Implied Contract.

If no valid executory contract under Rev. Stat. Sec. 3744, was made, then claimant asserts its right to recover for goods delivered, under the rule laid down in *Clark v. United States*, 95 U. S. 539, as follows, p. 542:

"We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*."

See *Salomon v. United States*, 19 Wall. 17; *United States v. Andrews*, 207 U. S. 229.

The price of 26 cents per pound for copper delivered after July 2, 1918, is the *quantum meruit*. It was fixed by the War Industries Board and is alleged, amended petition par. XIII, p. 25, to be "the fair and just compensation." The price fixed in the order of March 28, 1918, is not the *quantum meruit*. It cannot prevail over the price officially fixed and now alleged to be "fair and just." For this reason, appellant insists upon its claim to 26 cents per pound.

DELAY THE GOVERNMENT'S FAULT.

If it be held, notwithstanding the foregoing, that appellant would be limited to 23.5 cents per pound, if deliveries had been made in accordance with the order of March 28, 1918, Exhibit F, p. 31, we still maintain that it is entitled to 26 cents per pound for deliveries after July 2. This position rests upon the following reasoning:

(a) The parties agreed to the delivery of a certain amount of copper by June 1, 1918.

(b) By failure to give shipping instructions and by diverting available copper to other uses, the government prevented appellant from making deliveries by this date.

(c) On June 1, 1918, appellant had an election, if ordinary rules of law govern this war transaction, to cease delivery or to continue to deliver and charge the additional cost due to the delay.

(d) On July 2, 1918, the market price rose and appellant was damaged to the amount of the rise.

(e) If the legal obligations of the parties were affected by the necessities of the war, the limitation of the supply, its control by the government and the relation between the government, the Copper Producers' Committee and the appellant and are to be measured by the duties of patriotism, the obligation of appellant was to continue deliveries. The corresponding obligation of the government was to pay the extra cost which the rise in price had required appellant to assume.

AN ELECTION TO CLAIM DAMAGES.

Damages for delays caused to a contractor by the acts of the other party have most frequently arisen in the case of building contracts. It has uniformly been held

that a contractor may elect either to stop work for such a breach, where serious, or may complete performance and claim damages.

In *McMaster v. New York*, 108 N. Y. 542, there was a breach by the State of a contract for construction. The contractor completed the work, received the contract price and sued for damages. The court said, p. 553:

"The contention that, where there is a breach of contract by one party and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that where one party to a contract breaks the same, the other party may stop and refuse further performance. But instead of doing so he may perform so far as he is permitted and then claim the damages he has suffered from the breach."

This is here treated as a rule of law governing contracts in general.

In *Tobey v. Price*, 75 Ill. 645, plaintiffs contracted to furnish defendant with brick work on a building. This could not be done until certain stone and iron work was done by defendant. This was greatly delayed to plaintiffs' damage, who completed their work and sued for damages due to the delay. Defendant urged that plaintiffs should have abandoned the work, but, electing to complete, can claim only the contract price. The court said, p. 647:

"We know of no authority for such a position. Appellees could have abandoned the work and brought their action for damages, but their right to proceed with the work to completion, and then claim damages, cannot be seriously questioned."

This is repeated in *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210.

In *Kelly v. United States*, 31 C. Cls. 361, where, through the failure of the other party to procure a building site according to the contract, the contractor lost time and had to purchase material at an increased price, he was allowed to recover the difference in price of the materials and the value of his services for the time lost. The court there recognized the election, saying, p. 375:

"Had the claimants so elected, they might, after the defendants' failure within a reasonable time to make ready the site for the building, have rescinded the contract and recovered the value of the services actually performed as upon a *quantum meruit*."

In *Moore v. United States*, 46 C. Cls. 139, the court said, p. 178:

"As a result of this violation of the contract on the part of the government, the contractors were compelled to give up some of the contracts which they had made for the supply of stone for the dock. In the meantime the price of labor steadily advanced, and by the time inspection of stone began, and the contractors could renew their contracts for stone, they were compelled to do so at much greater cost.

"We think the claimants clearly entitled to recover for this increase in the cost of stone caused by the delay of the defendants."

See the same rule asserted in *Roettinger v. United States*, 26 C. Cls. 391, 410.

The principle is one of general application in the law of contracts and is equally applicable to contracts of sale. It was applied in *Garfield &c. Co. v. Fitchburg R. R.*, 166 Mass. 119, to a case arising under a contract for

sale and delivery of coal. This was delivered by plaintiff to defendant in vessels and defendant was recognized to be under an implied obligation to discharge these vessels within a reasonable time. Defendant delayed discharge and plaintiff was damaged by the delay. It was held that, although plaintiff might after a reasonable time have taken its vessels away and discharged them elsewhere, it did not lose its right to damages by allowing defendant to discharge them after the reasonable time had expired. The court said, p. 123:

"But a contractor, by taking what he can get under his contract when he can get it, no more necessarily and as matter of law waives a claim for damages for failure to perform on time than he necessarily waives a defect of quality by accepting goods."

Cases under the law of sales must be rare, where the circumstances are like these, when deliveries on a rising market were delayed by the buyer and the seller continued to deliver. The rule under normal circumstances has been to stop deliveries. This is illustrated in such a case as *Louisville &c. R. R. Co. v. Diamond State Iron Co.*, 126 Ill. 294, where the contract was to deliver goods, shipping orders to be given by buyer. It was held that buyer's failure to give such orders was a sufficient excuse for nondelivery. See also Benjamin on Sales, Am. ed., 1888, p. 635.

The converse of the principle above urged, is stated in 2 Williston Contracts, Sec. 704, that the buyer may sue for delay in performance, the author saying, p. 1355:

"Lord Blackburn in his treatise on the Law of Sales says:

"The vendee may accept the goods and bring his action for any damages he may have actually suffered in

consequence of the late delivery. He does not by accepting the late delivery waive any claim he may have for damages arising from the delay.'"

In *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127, a contractor for delivering coal delayed its deliveries beyond the contract term to a period of higher freight rates. Plaintiff accepted the coal subject to its claim for the difference paid by it for freight. It was held entitled to recover.

In *Clydebank Co. v. Yzquierdo*, 1905 Appeal Cases, 6, vessels were delivered after the contract date of completion. Liquidated damages were stipulated for delay. Payment was made without deduction of, or claim for, such damages. It was held that there was no waiver either by receipt of the vessel or payment of the contract price and that the suit would lie.

In *Hipwell v. Knight* (1 Younge & Collyer, Eq. Exch. 401, 416), Baron Alderson, discussing cases in which time is or is not of the essence of the contract, concludes:

"If, therefore, the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock and of a reversion, are instances of this."

The Supreme Court of Illinois held *Wilson v. Roots*, 119 Ill. 379, 392:

"It is true that, in general, time is not, unless so declared by the parties, of the essence of the contract; but the rule has exceptions, as, if the thing sold be of greater or less value, according to the effluxion of time, it is manifest that time is of the essence of the contract."

In the court below, *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, was cited by defendants. There this court distinctly declared, p. 164, that the extended deliveries were within the period fixed by the contract and that the United States was not at fault. Here the facts showing the responsibility of the United States are averred and are admitted by the demurrer.

If appellant had an election on June 1, 1918, to stop further deliveries, it had an equal right to continue and claim damages.

THE WAR CONDITIONS.

Under the war conditions, it was the duty of patriotism to continue. Legal obligation should keep pace with such duty. Appellant knew that the rest of the copper was needed after June 1, 1918, as shipping instructions were received. The organization of the industry, by arrangement with the government, was such that appellant was the only practicable channel for foreign shipments, amended petition, pars. III and IV, pp. 15-17; Appendix No. 1, *post*, p. 37. Refusal to deliver would have caused confusion and delay when promptness was imperative. The law must be construed in reference to these imperative conditions. Whatever the right of election in peace, the obligation in war was to respond to the government's needs, to continue deliveries and to rely upon the courts for protection.

Even if the election existed to stop deliveries, appellant should not be in a less favorable position because it continued. The imperative call of the public welfare must answer the objection that appellant lost any of its rights by meeting the needs of the government.

Cases adjudicated since the war show that the courts have treated the war conditions as profoundly modifying ordinary obligations. In *Roxford Knitting Co. v. Moore*, 265 Fed. 177, cited, *ante*, p. 15, a contract with the government for military supplies in an industry officially mobilized for national needs was held to relieve the manufacturer from the obligations of prior contracts. In *Ross Lumber Co. v. Hughes Lumber Co.*, 264 Fed. 757, C. C. A., 5th Cir., it was held that a contract for sale of lumber at market prices could not be enforced after the government had fixed a maximum price. In *Texas Co. v. Hogarth Shipping Co.*, 265 Fed. 375; affirmed by C. C. A., 2d Cir., 267 Fed. 1023, it was held that a requisition of a foreign vessel by its government relieved the owner from a suit for damages under a prior charter.

An Informal Contract.

Appellant, beside the relief to which it is entitled upon a *quantum meruit* for goods actually delivered, is equally entitled to the benefit of the Dent Act of March 2, 1919, *post*, p. 60. Congress recognized by this act that there would be many agreements "not executed in the manner prescribed by law" and therefore gave authority to the Secretary of War to settle and adjust such agreements. If this transaction was an agreement rather than an order, it is within this act because it was not executed as required by Rev. Stat. Sec. 3744.

In directing the settlement of agreements, Congress in this act made two departures from the strict rules of legal right existing under formal contracts: one in favor of the contractors—that the settlements should be "upon a fair and equitable basis," and one in favor of the United States,—that there should be no allowance for

prospective profits. By the former provision, the Secretary of War could be relieved from the enforcement of harsh rules of law which would result in injustice; by the latter, contractors were deprived of what under a valid contract is declared by this court to be "part and parcel of the contract itself," *United States v. Behan*, 110 U. S. 338, 344.

All the powers to be exercised by the Secretary of War under Sec. 1 of this act are to be exercised by the Court of Claims under Sec. 2. Such cases are subject to appeal to this court under Judicial Code, Sec. 242, formerly Rev. Stat. Sec. 707, *Ex parte Zellner*, 9 Wall. 244; *Vigo's Case*, 21 Wall. 648; *United States v. Irwin*, 127 U. S. 125.

FAIR AND EQUITABLE BASIS.

What is a fair and equitable basis for settlement in this case? The contractor agreed to furnish 30,000 tons of copper by June 1, 1918. It had therefore been represented to the United States by appellant's associate, the United Metals Selling Company, record, near top p. 28, that the price of 23.5 cents per pound would be unsatisfactory after that date. Appellant repeatedly objected to furnishing copper after that date at the price fixed in the informal agreement. Its only agreement was to furnish copper to that date. It was prevented by the United States from furnishing this copper by that date. It was at liberty to stop delivering copper at that date. Because of the government's war needs, it continued to furnish the copper, although this price was no longer "fair and just compensation."

Congress has directed a settlement "upon a fair and equitable basis." It is unnecessary to define the full extent of these words to apply them to this case. They

mean at the very least that the rules of law applicable to the case shall be construed liberally in favor of substantial justice to both parties. Appellant therefore asks this court to recognize the "fair and equitable" principle that it should be paid a fair price for what it furnished after its contract obligation to furnish at a lower price had ceased by the government's fault. This is no more, as already shown, than the application to this case of principles of law repeatedly declared by the courts.

The ultimate equity in this case is that a judgment for appellant would result in its receiving an admittedly fair price for copper at the date when it was delivered, instead of a price which was reasonable at an earlier date, when appellant was prepared to deliver it and would have delivered it, except for the acts of the United States.

CONCLUSION.

It is respectfully submitted that this judgment should be reversed because:

1. This copper was furnished under a commandeering order issued by authority of the act of June 3, 1916, which provides payment of a "fair and just" compensation. For deliveries after July 2, 1918, such compensation is the sum claimed.

2. Claimant's right of action under implied contract, if such exists, is on a *quantum valebat* for goods delivered under order. The fair value of the copper delivered after July 2, 1918, is the sum claimed.

3. Claimant's only agreement with the United States was to deliver copper up to June 1, 1918. Deliveries were not concluded by that date because appellant was prevented by acts of the United States. It should be paid the losses sustained by it on later deliveries, arising out

of the advance in value of copper after July 2, 1918, to the sum claimed.

4. In time of peace, appellant might on June 1, 1918, have refused further deliveries and saved itself from loss. In time of war patriotic duty, as well as legal obligation, compelled it to continue deliveries and rely upon subsequent judicial relief. It should not suffer for doing its duty to the country.

5. Under the act of March 2, 1919, appellant is entitled to settlement upon "a fair and equitable basis." Fairness and equity demand that it should be paid the value at date of delivery, since the delivery in a period of higher prices was caused by the acts of the United States.

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APPENDIX NO. 1.

EXTRACT FROM OFFICIAL REPORT OF WAR
INDUSTRIES BOARD TO THE
PRESIDENT,

by

Bernard M. Baruch, Chairman.

Government Printing Office, 1921.

Part II, p. 130.

CHAPTER 3.

COPPER AND BRASS.

COPPER.

Second only to steel in its importance, as a basic metal required for war, is copper. And in the spring of 1917 the copper market pointed just as unerringly as that of steel to the necessity for some kind of Government control. Electrolytic copper sold around 16 cents a pound before 1914. It was selling at 35.74 cents in March, 1917. The rise had been steady except during the short period in 1916 when an early peace seemed probable.

This country controls the bulk of the copper in the world. Demand, due to war requirements of the Allies, was far outrunning supply for two years before we entered the conflict. And it was evident that the situation would grow steadily worse as our participation in the war was enlarged. Maximum production was of extreme importance. Thus it was that copper became one of the first problems to engage the attention of Mr. Baruch when he came to Washington early in March, 1917, to take charge of raw materials as a member of the advisory commission of the Council of National Defense.

There were two schools of thought touching the question. The one argued that, as increase of production was the essential factor, the rise in prices should not be interfered with, but the accumulation of undue profits should be taken care of through excess profit taxes; the

other, which included Messrs. Summers, Meyer, and Baruch, believed that there was a limit to which high prices would be effective in stimulating production, and that, if advances in this and other commodities were allowed to take their course, not only would the readjustments incident to peace bring catastrophe with them, but it would also be next to impossible to finance the war. They believed that control over prices and excess profit taxes were both necessary.

Their first action was an appeal to the large producing and smelting interests direct. This appeal resulted, on March 20, 1917, in an understanding by which the Army and Navy were enabled to purchase their requirements, estimated at that time to be 45,510,000 pounds, to be delivered quarterly for a year, at 16.6739 cents a pound. This represented the actual average selling price obtained by the United Metals Selling Co. over a period of 10 years, 1907 to 1916. The market quotations for that date were 35.74 cents per pound, and sales were being made as high as 37 cents. The copper industry was the first one to come forward with its offer in the industrial preparedness campaign. This early offer of the copper trade, followed rapidly as it was by several other trades, to sell to their own Government its war needs at prewar prices had an important psychological effect upon prices generally. Eugene Meyer, Jr., originally proposed the arrangement, and it was Daniel Guggenheim and John D. Ryan who brought about the agreement on the side of the copper trade. Market prices began to decline from this date, but they did not fall rapidly.

Meanwhile war broke out and the increasing copper requirements found the market with scarcely enough copper to meet contract needs, even by calling reserve stocks into use, watching supplies, and carefully conserving every pound. The necessity for stimulating increased production seemed paramount. The Federal Trade Commission was asked to examine into the current costs of production.

Another order for 60,000,000 pounds was placed on June 27 by the War Department for early delivery, with

the open market standing at the time at 32.57 cents. After much discussion the price determination was left until the Federal Trade Commission should report on costs. Shortly afterward the Secretary of the Navy announced that he would pay down for Navy copper 75 per cent of 25 cents a pound, leaving the other 25 per cent for adjustment when the cost of production should have been determined.

The announcement of this policy, which was interpreted in some quarters as the price the Government intended to fix, gave concern to the markets. Strikes or threatened strikes at the mines in Arizona pointed to serious curtailment of production. The miners were being paid on a sliding wage scale, adjusted to the price of copper.¹ Their wages were based on 27-cent copper at this time. They threatened to strike if these wages should be reduced, and did strike wherever they were reduced.

The producers continued to supply copper to the Government, but refused to bill it at $18\frac{3}{4}$ cents. The indebtedness of the Government to producers soon ran into millions of dollars. Refiners were short of blister and were running at only 60 to 75 per cent capacity, but the curtailment was not due to the delayed payments.

In the meantime the War Industries Board, upon which were representatives of the Army and Navy, had been created and in its examination of price problems became convinced that $18\frac{3}{4}$ cents would curtail produc-

¹ These sliding scales provide for the minimum wages of \$3.50 per day of eight hours for miners and men employed underground, and \$4.50 for mechanics, with many higher classifications where skilled labor is necessary; the minimum to apply when copper sells below 15 cents per pound, and 25 cents additional per day to every man employed to be paid for each 2-cents advance in the price of copper above 15 cents. The result had been that for over a year wages were based on a price of copper at 27 cents and above, so that miners were receiving \$5 to \$5.25 per day, and all mechanics \$6.25 to \$6.50 per day.

tion. The Board agreed to advance $22\frac{1}{2}$ cents to the producers and to leave the difference between $22\frac{1}{2}$ cents and 25 cents to the findings of the Federal Trade Commission.

The demands of the Allies were an equally important consideration at this time. During 1916 England and France had purchased over 660,000,000 pounds of copper in the United States in blocks so large as to be featured in the trade news. In September, 1916, 448,000,000 pounds were purchased at 27 cents. This had reduced stocks everywhere to lowest level and caused a highly speculative market. While their purchases in the spring of 1917 were in less dramatic quantities, they still continued to take such copper as they could secure.

In August, while the discussion of prices and production was at its height, it was officially made known to the War Industries Board that the French and British were in the market for 60,000,000 pounds. The Board decided to call the producers into conference and, bearing in mind their firm offer to the Government of copper for 25 cents per pound, make them a tentative offer of 20 cents for this quantity. This offer was made at a meeting on August 7, but it was agreed that the price should be subject to revision, upward or downward, later.² After the representatives of the trade withdrew from the meeting, it was moved that if the copper producers refused to enter into this agreement the Government would proceed to commandeer the necessary supply. When the joint meeting was resumed it appeared that the opposition of the industry to the 20 cents, and indeed to sales at a memorandum price at all, was very determined, and the arguments in support of the opposition seemed worthy of most serious consideration. On August 8 the Board passed the following resolution:

That as the copper emergency requires immediate action necessary to secure a supply for our Government and our allies, the Board endeavor to

² See War Industries Board Minute Book, Aug. 7, 1917.

secure from the copper interests the needs of ourselves and our allies at a price to be fixed when we shall see the report of the Federal Trade Commission as to the costs and for purposes of payment on account of deliveries, a tentative price of 22½ cents to be fixed with the understanding that this price shall in no way be taken into consideration when the final price is to be determined.

The result of the controversy was that on August 16, 1917, the copper interests agreed to deliver 77,000,000 pounds to the Allies on a memorandum, no price to be paid pending the final fixing of a price after an investigation.

By September 5, 1917, the Federal Trade Commission had made its report on costs of producing copper, the War Industries Board had studied it, and at a meeting that day reached a conclusion to fix the price of electrolytic copper at 22 cents per pound.

In order to acquaint the copper interests with the position of the Board, to try to reach an agreement with them, and to secure their cooperation, their representatives were called to Washington on September 11. The representatives were told that the Board believed that 22 cents per pound f. o. b. New York for refined electrolytic copper, 99.93 per cent pure, was a fair price and would allow the producers a reasonable profit. They were told that the price should hold for a certain period only, and could then be revised upward or downward; further, that it was to be applicable alike to the Government, the Allies, and the public, and that wages to labor should remain the same notwithstanding the sliding scale agreement.

The industry objected. Their position was presented orally at the meeting, and three days later by a long memorandum. They declared flatly that the copper interests could not control the price to the public at a point much below 25 cents, and that, if the Government fixed 22 cents as the price, the small high-cost producers would not voluntarily cooperate in selling at the fixed price. They pointed out that acute labor troubles would result

should the sliding scale of rates be disturbed. They showed how impracticable it would be for the Government to commandeer the numerous small high-cost mines. They gave evidence to show that if 22 cents were finally fixed it would be impossible to obtain the cooperation of the majority of mine owners. The difficulty was not with the large producers, in whose hands, of course, the bulk of the business is concentrated, but the copper industry also embraces a large number of smaller high-cost producers, whose product was also needed in the extraordinary emergency. Everybody agreed that the considerable output of the small high-cost producers was indispensable.

The copper interests pointed out with particular care the important bearing of wages on copper prices. It is true that there are few raw materials of which so large a percentage of the cost of production goes to pay wages. They pointed out that the average wages of all men in the copper industry had been advanced 50 per cent over those of 1915, and that they could not be lowered without serious consequences. Labor shortage and labor unrest might easily make it necessary to raise them. If wages were to be maintained, the small plants could not keep open on a selling price of less than 25 cents. Their memorandum contained the following proposal:

While some of the low-cost producers will show a large profit at 25 cents, some of the largest and practically all of the small producers can not show more than the usual peace-time profit at that price, and if depletion of mines is considered, their profit would probably be less than in normal times at average prices. We believe that it would be to the interest of the Government to pay 25 cents per pound and to take all of the production of all of the mines of the country at that price, retaining all the copper which is needed for this Government and for its Allies, and selling the balance at the same price, or approximately the same price, to the public.

Following the conference in Washington of Septem-

ber 11 the leading copper producers met in New York on September 14 and voted to propose to the War Industries Board a compromise price of $23\frac{1}{2}$ cents. In their communication they said:

With one exception those present agreed that if your committee would unanimously recommend a price of $23\frac{1}{2}$ cents * * * we would still be able to get the practical result that we are aiming for, that is, pretty nearly maximum production; therefore, I would say that if your committee would agree to $23\frac{1}{2}$ cents we can pledge the copper industry almost as a whole to use every possible means to secure a maximum production and to maintain the present scale of wages, and I am satisfied we can succeed.

On September 21, 1917, the price of $23\frac{1}{2}$ cents was definitely fixed in the form of an agreement between the Government and the producers. It was approved by the President, subject to revision after four months; the short period being established for the purpose of allowing any producer, consumer, or other interested party to appear and present reasons, if any, for increasing or decreasing the price. It is interesting in this connection to note that while many producers appeared with arguments urging increases, no consumer, public or private, nor official of our own or other Government, appeared to object to the prices as too high. The fact is the fixed price of copper represented a smaller advance over pre-war normal than that of perhaps any other commodity. This was the first negotiated price-fixing arrangement ever established by the United States Government. As part of the agreement the producers pledged themselves not to reduce wages; to sell their products to the Allies and the general public at the same price as that to be paid by the Government; to exert every effort to maintain maximum production during the war; and to take the necessary measures to prevent copper from falling into the hands of speculators. The Army, Navy, and other

Government agencies interested in the purchase of copper participated in the negotiations.

The industry, though dissatisfied, had finally acceded. They believed that at least it gave them a definite program and would bring stability. But within a week many questions began to arise as to how the new scheme was to be administered. This was a new kind of undertaking both for the Government and the industry.³

A letter of inquiry was addressed to the Board October 19, 1917, and its prompt answer contained the Government's solution of several of the most important problems.

(1) That all outstanding bona fide contracts between producers and consumers might be consummated at contract prices. Some of these were at 27 cents a pound. But under the priority agreement our Government had first call and the Allies second, and as these two purchasers consumed nearly all the supply, few high-priced orders could be filled.

(2) The rule was laid down that all contract sales made for delivery after the expiration of the present fixed price (Jan. 21, 1918) should be made at a price subject to any revision which the Board might see fit later to make.

(3) In answer to the complaint that outside dealers and brokers were trading and quoting at 28, 29, and 30 cents for copper, a control committee or selling agency was established, which by buying and selling at the fixed price was designed to crowd the speculators from the market.

(4) It was urged that differentials be established for

³ The Wall Street Journal of Sept. 27, 1917, said in this connection: "Both producers and consumers are 'up in the air' due to lack of details in connection with carrying out of the proposed plans for handling the copper market, and this condition will continue until Washington furnishes more detailed advices as to what can be done and what should not be attempted under the new order of things."

modifications from electrolytic copper, and particularly that prices for scrap be fixed. But it was ruled that no other prices would be fixed.

The price of $23\frac{1}{2}$ cents was continued until July 2, 1918, when it was increased to 26 cents and remained at that figure until control ceased. By the spring of 1918, many complaints of hardship were coming to the Board from the numerous small high-cost producers. The Government was requiring about 93 per cent of the output at this time, 49 per cent being consumed by the United States and 44 per cent by the Allies.

Maximum production was absolutely required and the Government could afford to take no risk of causing a reduction. The price-fixing committee voted on May 22, 1918, to continue the $23\frac{1}{2}$ cents until August 15. But a few days later, when evidence had been shown them of advances in freight rates and increases and prospective increases in costs of labor, which were making the smaller producers run at such great loss that they would have to close down; the committee voted that the price should be raised to 26 cents on July 2.⁴ A committee, formed to represent 15 of the smaller companies, presented the case at Washington.

The fixing of copper prices, as was the case of steel, brought with it the necessity of control in other directions. Control over the distribution of copper was far less difficult than that of steel. While civilian uses of copper are very numerous and very important, they are not nearly so indispensable, particularly for a short period, as are those of iron and steel. The war required over 90 per cent of the copper which we could produce. This simply meant that civilian use had to be practically suspended, and this was accomplished not so much by priority control in the sense in which that process was used on steel; but it was accomplished through the purchase by the War Department of a high percentage of

⁴ The cost sheets of the smelting and refining companies showed losses. One and a half cents of the advance went to smelters and refiners, one cent to producers.

the copper and its distribution to the manufacturers of armaments as they needed it.

The principal responsibility of the Board, after the market had once been stabilized, was to watch over production and take care that it was not diminished; to guard against speculation; and to keep the small producers encouraged to continue their furnaces. The copper producers' committee, at the direction of the Board, allocated the various orders.

In October, 1917, Eugene Meyer, jr., was placed in charge of the Board's section on nonferrous metals. He gave particular attention to the problem of maintaining adequate production and the proper distribution of copper, but did not take part in the price fixing. He remained in this position until March, 1918, when he became a director in the War Finance Corporation, and Pope Yeatman succeeded him and remained chief until the end.

A word of explanation of the copper producing industry may make this story more clear. In the first stages of production copper-bearing ores are smelted, the metals being reduced and segregated from the nonmetals in a product known as "blister copper." Frequently associated with the copper are gold, silver, nickel, platinum, selenium, and other metals. They all occur in the blister. The electrical conductivity of copper is diminished by the presence of other metals. Therefore, in order to purify the blister and to recover the gold, silver, and nickel the crude or blister copper is refined by the electrolytic process, and the product is the electrolytic copper of commerce which runs 99.93 per cent pure. When, however, the blister copper carries a negligible quantity of the more precious metals, it is usually refined by the furnace method, and this less pure product is known as casting copper, and is sold a little below the pure grades. Pig copper is produced in one smelting operation from ores which are free from precious metals. "Lake copper" is a product which comes from the Lake Superior districts where native metallic copper occurs almost free from other elements. It is crushed and refined by the furnace method.

The production of copper in the United States increased about 51 per cent between 1913 and the end of the war. In 1917 it was 2,428,000,000 pounds of new copper. Lake producers increased their output. A number of new deposits were discovered, but the most important cause of increase was expansion and improvement in equipment and processes at established properties. Several new smelting plants, concentrating plants, and refineries were put into operation, while many more were remodeled for the purpose of installing newly developed processes and equipment.

There was a 100 per cent increase in the production of recovered copper, the 1918 output being a half billion pounds. This metal is derived by remelting and refining furnace ashes and cinders, scrap composed of clippings, punchings, borings, etc., and from discarded articles. Recovered copper can be refined electrolytically and made equal to the virgin product. Copper alloys, like brass, when recovered, need not be reduced to the separate metals, but can be brought up to specifications by a suitable admixture of new metals in the process of refining.

Despite many hardships and obstacles, the American copper producers played their part and contributed to the successful prosecution of the war in a way second to no other industry. There are ample grounds for the belief that the prices fixed by the Government worked hardship on many operators; and to add to the distress, the signing of the armistice on November 11 left them, like producers of other raw materials, with very large stocks on hand, produced at the highest costs in the history of the trade, and with no large orders booked.

APPENDIX NO. 2.

OFFICIAL BULLETIN PUBLISHED DAILY UNDER ORDER OF THE PRESIDENT BY THE COMMITTEE ON PUBLIC INFORMATION,

George Creel, Chairman.

[*Note:* The following authorities sanction judicial notice of public documents: *Romero v. United States*, 1 Wall. 721, syllabus, paragraph 1, Mexican archives; *Jones v. United States*, 137 U. S. 202, 216, 217, State Department order taking possession of an island; *Knight v. U. S. Land Association*, 142 U. S. 161, top p. 169, Records of Interior Department; *Caha v. United States*, 152 U. S. 211, 222, Departmental Land Regulations; *New York Indians*, 170 U. S. 1, 32, Public Records relating to Indian Lands. "The Federal courts will take judicial notice of official statements of the heads of the executive departments, such as the War Department," *United States v. Brewer-Elliott Oil and Gas Company*, 249 Fed. 609, 610; par. 15 of syllabus.]

Vol. 1 *Washington, Thursday, May 10, 1917* No. 1

Official Bulletin Will Give Public Detailed War News.

The OFFICIAL BULLETIN, of which this is the first issue, is designed to inform the public on the progress of the war and of official acts incident to its prosecution. It will be published daily by the Committee on Public Information.

This committee, consisting of the Secretaries of State, War, and Navy, with George Creel as the civilian chairman, was recently designated by President Wilson to inform the country as fully as military exigencies will permit on all subjects relating to the war.

It is proposed to present in its columns all proclamations and Executive orders issued by the President; rules and regulations promulgated by the Federal departments;

official bulletins and statements; statutes bearing on the war and their construction, and all other subjects related to the prosecution of the war, to which publicity may properly be given.

The BULLETIN will be distributed without cost to public officials, newspapers, and agencies of a public or semi-public character equipped to disseminate the official information it will contain. It will be conspicuously posted in all post offices, and the committee urges all libraries and other public or semipublic institutions receiving this publication to make it available to the public whenever possible.

Official Bulletin of September 21, 1917, p. 1.

AGREEMENT FIXING COPPER PRICE 23½ CENTS POUND ANNOUNCED.

President Approved Compact Made by War Industries Board with Producers—Present Wages Not to be Reduced and Cost to Allies Will be Same as to the U. S.

After investigation by the Federal Trade Commission as to the cost of producing copper, the President has approved an agreement made by the War Industries Board with the copper producers fixing a price of 23½ cents per pound, f. o. b. New York, subject to revision after four months. Three important conditions were imposed by the Board: First, that the producers would not reduce the wages now being paid; second, that the operators would sell to the allies and to the public copper at the same price paid by the Government, and take the necessary measures, under the direction of the War Industries Board, for the distribution of the copper, to prevent it from falling into the hands of speculators who would increase the price to the public; and, third, that the operators pledge themselves to exert every effort necessary to keep up the production of copper to the maximum of the past so long as the war lasts.

The War Industries Board felt that the maintenance

of the largest production should be assured, and that a reduction in wages should be avoided. The stipulation that present wages shall not be reduced compels the maintenance of the highest wages ever paid in the industry, which without such stipulation would, with the reduction made in the price of copper, be reduced under the sliding scale so long in effect in the copper mines. Within this year copper has sold as high as 36 cents per pound, and the market price would now be higher than it is had it not been well known for some weeks that the Government would fix the price.

The principal copper producers throughout the country have evinced an admirable spirit, and for weeks have promptly supplied every request of the Government for copper without awaiting decision as to price and agreeing to accept the price which the board should ultimately fix. The proper departments of the Government will be asked to take over the mines and plants of any producers who fail to conform to the arrangement and price, if any such there should be.

Official Bulletin of January 23, 1918, p. 4.

EXTENSION OF COPPER PRICE APPROVED BY THE PRESIDENT.

The President has approved the recommendation of the War Industries Board that the maximum price for copper fixed upon its recommendation by the President, and announced September 21, 1917, be continued in effect upon the same conditions until June 1, 1918. That is to say, the maximum price to be 23½ cents per pound f. o. b. New York, subject to revision after June 1, 1918, upon the conditions, first, that the producers will not reduce the wages now being paid; second, that the producers will sell to the allies and to the public copper at the same price paid by the Government, and take the necessary measures under the direction of the War Industries Board for the distribution of the copper to prevent it from falling into the hands of speculators who

would increase the price to the public; and third, that the producers pledge themselves to exert every effort necessary to keep up the production of copper to the maximum of the past, so long as the war lasts.

Official Bulletin of March 6, 1918, pp. 1, 5.

REORGANIZATION OF WAR INDUSTRIES BOARD, WITH
MR. BERNARD M. BARUCH, CHAIRMAN,
ANNOUNCED BY PRESIDENT.

Its Functions Outlined.

Letter Written by Mr. Wilson to New Head of Board
is Made Public—Chairman's Duties Are Set Forth.
Committee to Aid in Fixing Prices.

The President yesterday announced the reorganization of the War Industries Board under the chairmanship of Mr. Bernard M. Baruch.

It was announced at the same time that Judge Robert S. Lovett, who has done such admirable work as the priorities member of the War Industries Board, has consented to take charge of the railroad improvement work, which the Director General of Railways has decided to put upon the best and most effective footing possible.

Letter to Mr. Baruch.

The reorganization of the War Industries Board was outlined by the President in the following letter to Mr. Baruch:

The White House,

Washington, March 4, 1918.

My Dear Mr. Baruch:—I am writing to ask if you will not accept appointment as chairman of the War Industries Board and I am going to take the liberty at the same time of outlining the functions, the constitution and action of the board as I think they should now be established.

The functions of the board should be:

(1) The creation of new facilities and the disclosing, if necessary the opening up, of new or additional sources of supply.

(2) The conversion of existing facilities, where necessary, to new uses.

(3) The studious conservation of resources and facilities by scientific, commercial, and industrial economies.

(4) Advice to the several purchasing agencies of the Government with regard to the prices to be paid.

(5) The determination, wherever necessary, of priorities of production and of delivery and of the proportions of any given article to be made immediately accessible to the several purchasing agencies when the supply of that article is insufficient, either temporarily or permanently.

(6) The making of purchases for the allies.

Final Decisions by Chairman.

The board should be constituted as at present and should retain, so far as necessary and so far as consistent with the character and purposes of the reorganization, its present advisory agencies; but the ultimate decision of all questions, except the determination of prices, should rest always with the chairman, the other members acting in a cooperative and advisory capacity. The further organization of advice I will indicate below.

In the determination of priorities of production, when it is not possible to have the full supply of any article that is needed produced at once, the chairman should be assisted, and so far as practicable, guided by the present priorities organization or its equivalent.

Priorities of Delivery.

In the determination of priorities of delivery when they must be delivered, he should be assisted when necessary, in addition to the present advisory priorities organization, by the advice and cooperation of a commit-

tee constituted for the purpose and consisting of official representatives of the Food Administration, the Fuel Administration, the Railway Administration, the Shipping Board and the War Trade Board, in order that when a priority of delivery has been determined there may be common, consistent, and concerted action to carry it into effect.

In the determination of prices the chairman should be governed by the advice of a committee consisting besides himself, of the members of the board immediately charged with the study of raw materials and of manufactured products, of the labor member of the board; of the chairman of the Federal Trade Commission, the chairman of the Tariff Commission, and the Fuel Administration.

The chairman should be constantly and systematically informed of all contracts, purchases, and deliveries, in order that he may have always before him a schematized analysis of the progress of business in the several supply divisions of the Government in all departments.

The duties of the chairman are:

(1) To act for the joint and several benefit of all the supply departments of the Government;

(2) To let alone what is being successfully done and interfere as little as possible with the present normal processes of purchase and delivery in the several departments;

(3) To guide and assist wherever the need for guidance or assistance may be revealed: For example in the allocation of contracts, in obtaining access to materials in any way preempted, or in the disclosure of sources of supply;

(4) To determine what is to be done where there is any competitive or other conflict of interest between departments in the matter of supplies: For example, when there is not a sufficient immediate supply for all and there must be a decision as to priority of need or delivery, or when there is competition for the same source of manufacture or supply or when contracts have not been placed in such a way as to get advantage of the full productive capacity of the country;

(5) To see that contracts and deliveries are followed up where such assistance as is indicated under (3) and (4) above has proved to be necessary:

(6) To anticipate the prospective needs of the several supply departments of the Government and their feasible adjustment to the industry to the country as far in advance as possible, in order that as definite an outlook and opportunity for planning as possible may be afforded the business men of the country.

In brief, he should act as the general eye of all supply departments in the field of industry.

Cordially and sincerely yours,

WOODROW WILSON.

Official Bulletin, May 31, 1918, p. 1.

PRESIDENT'S ORDER MAKING WAR INDUSTRIES BOARD
AN EXECUTIVE AGENCY.

Executive Order.

I hereby establish the War Industries Board as a separate administrative agency to act for me and under my direction. This is the board which was originally formed by, and subsidiary to, the Council of National Defense under the provisions of "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916.

The functions, duties and powers of the War Industries Board, as outlined in my letter of March 4, 1918, to Bernard M. Baruch, Esq., its chairman, shall be and hereby are continued in full force and effect.

WOODROW WILSON.

The White House,
May 28, 1918.

Official Bulletin, July 3, 1918, p. 5.

PRICE OF COPPER IS ADVANCED BY WAR INDUSTRIES BOARD.

The War Industries Board authorizes the following: Subject to the approval of the President, the price-fixing committee of the War Industries Board, in conference with representatives of the industry, today (July 2) fixed the price of copper at 26 cents per pound, an advance from 23½ cents, the price formerly fixed.

The new price goes into effect today (July 2) and will continue until August 15.

Official Bulletin of July 5, 1918, p. 4.

CONDITIONS OF NEW AGREEMENT ON MAXIMUM PRICE FOR COPPER.

The War Industries Board authorizes the following:

The President has approved an agreement made between the producers of copper and the price-fixing committee of the War Industries Board (after investigation by this committee in conjunction with the Federal Trade Commission as to the cost of production), that the maximum price on copper shall be 26 cents per pound, taking effect July 2, but subject to revision after August 15, f. o. b. cars or lighters at refinery if shipped from eastern refineries, and f. o. b. New York if shipped from western refineries, subject to the additional charges on copper shapes approved by the price-fixing committee on June 5, 1918.

The Conditions.

The conditions are: First, that the producers of copper will not reduce the wages now being paid; second, that they will sell to the United States Government, to the public in the United States, and to the allied Gov-

ernment at not above the maximum price; third, that they will take the necessary measures, under the direction of the War Industries Board, for the distribution of copper to prevent it from falling into the hands of speculators, who might increase the price to the public; and fourth, that they will pledge themselves to exert every effort necessary to keep up the production of copper so as to insure an adequate supply so long as the war lasts.

APPENDIX NO. 3.

STATUTES.

Revised Statutes, Sec. 3744.

It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

Revised Statutes, Sec. 3709.

All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when

the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

National Defense Act, June 3, 1916, 39 Stat. 166, 213.

CHAP. 134. An act For making further and more effectual provision for the national defense, and for other purposes.

SEC. 120. PURCHASE OR PROCUREMENT OF MILITARY SUPPLIES IN TIME OF ACTUAL OR IMMINENT WAR.—The President, in time of war or when war is imminent, is empowered through the head of any department of the government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or materials shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry, or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry; and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manu-

facturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War, shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any Department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.

Approved, June 3, 1916.

Overman Act of May 20, 1918, 40 Stat. 556, 557.

CHAP. 78. An Act Authorizing the President to coordinate or consolidate executive bureaus, agencies, and

offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: *Provided*, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: *Provided further*, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: *Provided further*, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war.

SEC. 2. That in carrying out the purposes of this Act the President is authorized to utilize, co-ordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the

whole or any part of the records and public property belonging thereto.

SEC. 3. That the President is further authorized to establish an executive agency which may exercise such jurisdiction and control over the production of aeroplanes, aeroplane engines, and aircraft equipment as in his judgment may be advantageous; and, further, to transfer to such agency, for its use, all or any moneys heretofore appropriated for the production of aeroplanes, aeroplane engines, and aircraft equipment.

SEC. 4. That for the purpose of carrying out the provisions of this Act, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said function.

SEC. 5. That should the President, in redistributing the functions among the executive agencies as provided in this Act, conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

SEC. 6. That all laws or parts of laws conflicting with the provisions of this Act are to the extent of such conflict suspended while this Act is in force.

Upon the termination of this Act all executive or administrative agencies, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding.

Approved, May 20, 1918.

Dent Act of March 2, 1919, 40 Stat. 1272, 1273.

CHAP. 94. An Act To provide relief in cases of contracts connected with the prosecution of the war, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November 12, 1918, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials, or supplies or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November 12, 1918, and such agreement has not been executed in the manner prescribed by law: *Provided,* That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further,* That this Act shall not authorize payment to be made of any claim not presented before June 30, 1919: *And provided further,* That the Secretary of War shall report to Congress at the beginning of its next session following June 30, 1919, a detailed statement showing the nature, terms, and conditions of every such agreement and the payment or adjustment thereof: *And provided further,* That no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed from the right of review of such settlement, nor the right of recovery of any money paid by

the Government to any party under any settlement entered into, or payment made under the provisions of this Act, if the Government has been defrauded, and the right of recovery in all such cases shall exist against the executors, administrators, heirs, successors, and assigns, of any party or parties: *And provided further*, That nothing in this Act shall be construed to relieve any officer or agent of the United States from criminal prosecution under the provisions of any statute of the United States for any fraud or criminal conduct: *And provided further*, That this Act shall in no way relieve or excuse any officer or his agent from such criminal prosecution because of any irregularity or illegality in the manner of the execution of such agreement: *And provided further*, That in all proceedings hereunder witnesses may be compelled to attend, appear, and testify, and produce books, papers and letters, or other documents; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding.

SEC. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section.

* * * * *

Approved March 2, 1919."

